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Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials

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BY BENJAMIN PERRIN*

Le droit pénal international se situe à la croisée du droit international public, du droit humanitaire international, du droit pour la protection des personnes et des lois pénales nationales. La sagesse conventionnelle voulant que les doctrines du droit international public applicables aux différends entre états se transposent aisément aux poursuites pénales internationales visant des individus nuit à notre compréhension de l'interrelation entre ces sources de droit.

Une étude approfondie des certaines décisions du Tribunal pénal international, pour l'ex-Yougoslavie et pour le Rwanda, démontre que ces tribunaux ne peuvent pas s'en tenir aux sources classiques du droit international public pour régler les cas difficiles. D'ailleurs, l'approche expérientielle utilisée pour la refonte de ces sources dans l'Article 21 du *Statut de Rome de la Cour pénale internationale* n'a pas résolu les tensions fondamentales inhérentes dans la tradition du droit pénal international.

Tant dans l'optique de ces tribunaux spéciaux modernes que dans le *Statut de Rome*, prétend l'auteur, la décision des cas épineux repose sur un choix judiciaire hautement discrétionnaire entre deux normes concurrentes : d'une part, la nécessité d'élargir la protection humanitaire lors de conflits armés, un idéal bien présent en droit humanitaire international, en particulier dans la clause Martens; d'autre part, un souci de justice plus équitable envers les prévenus, un idéal qui s'inscrit dans le corps grandissant des lois pour la protection internationale des personnes et codifié à l'Article 21(3) du *Statut de Rome*. Cet article tente d'élucider ces tensions fondamentales qui existent dans la jurisprudence pénale internationale à une étape importante où la CPI commence ses audiences dans une série d'affaires.

International criminal law finds itself at the confluence of public international law, international humanitarian law, human rights law and national criminal laws. Our understanding of the interrelationship between these sources of law has been hampered by the conventional wisdom that public international law doctrines applicable to disputes between states can be readily transposed to the international criminal prosecution of individuals.

A detailed analysis of selected decisions of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda demonstrates that these tribunals could not simply rely on classical sources of public international law to resolve difficult cases. Further, the experimental approach taken to recasting these sources of law in Article 21 of the *Rome Statute of the International Criminal Court* has not resolved fundamental tensions inherent in the international criminal law tradition.

Both at the modern *ad hoc* tribunals and in the Rome Statute, it is argued that difficult cases are decided based on a highly discretionary selection by judges between two competing norms. On one hand, there is the need to enhance humanitarian protection during armed conflict, an ideal embedded in international humanitarian law and particularly the Martens Clause. On the other hand, there is the aim of maximizing fairness to the accused, an ideal enshrined in the growing body of international human rights law and codified in Article 21(3) of the *Rome Statute*. This article seeks to illuminate these fundamental tensions within the international criminal law jurisprudence at a foundational moment when the ICC begins hearing its first set of cases.

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I. INTRODUCTION

Holding individuals responsible for serious violations of international humanitarian law was once a very controversial proposition. Individual criminal responsibility is now firmly established at the international and domestic levels to enforce international humanitarian law obligations contained both in treaties and, in some cases, customary international law. However, the legal architecture of this system of international humanitarian law enforcement remains incomplete and under-explored.

International criminal law finds itself at the confluence of public international law, international humanitarian law, human rights law and national criminal laws. Understanding the interrelationship between these sources of law has been hampered by the conventional wisdom that public international law doctrines applicable to disputes between states can be readily transposed to the international criminal prosecution of individuals. This article aims to contribute to our understanding of the challenges faced by international criminal tribunals in attempting to decide legal issues that have no clear answers based on existing articulations of applicable law.

One of the main findings of this research is that international criminal law is a hybrid legal tradition in which the constant tension between divergent sources of law are resolved in difficult cases not by resorting to well-established doctrines of public international law as often claimed, but rather by judicial discretion. This discretion is often exercised in a manner consistent with Patrick Glenn's theory of "transnational common laws" which posits that persuasive, non-binding norms that transcend national laws operate in the background and may be drawn upon to address gaps in applicable law.[1] Furthermore, one of the principal persuasive reasons for opting to follow one transnational common law over another is the favouring of one side

1. H. Patrick Glenn, "Transnational Common Laws" (2006) 29 Fordham Int'l L.J. 457 [Glenn, "Transnational Common Laws"].

of a fundamental tension in the international criminal law tradition: expanding humanitarian protection versus ensuring fairness to the accused.

The first part of this article examines decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) where intractable substantive and procedural issues have arisen in attempting to apply the traditional sources of public international law and its interpretative doctrines to previously unanswered legal questions. At the same time, international human rights law has demonstrated an increasingly strong normative force in the evolution of this body of jurisprudence. As the research presented in this article demonstrates, gaps have arisen in practice at these modern *ad hoc* tribunals that could not be filled by resort to the traditional sources of public international law. These gaps have largely been caused by problems in identifying customary international law and where differences between national laws have been discovered. In resolving these dilemmas, it is argued that international judges have been required to choose between two sides of a competing tension that flows from the core aspects of human rights law and international humanitarian law: ensuring fairness to the accused versus expanding humanitarian protection for victims.

The second part of this article critically evaluates Article 21 of the *Rome Statute of the International Criminal Court*,[2] which is the first attempt in an international treaty to define applicable law for international criminal law. The aims of this provision are explained and the implications of its split from the traditional public international law sources are explored. Efforts in the *Rome Statute* to restrain judicial discretion in defining existing law are reviewed in light of these findings. In this context, Article 21 is critically evaluated. This provision is found to have an inherent risk of being indeterminate and inconsistently applied. Article 21 authorizes the application of different laws to different accused persons. This is a troubling concept in criminal proceedings because it opens the door to judicial activism in ways not fully appreciated by the framers of the *Rome Statute*, who generally intended to limit the scope of judge-made law in comparison to the modern *ad hoc* tribunals. These challenges to the enforcement of international humanitarian law need to be exposed before they can be effectively addressed.

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2. 17 June 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force 1 July 2002) [*Rome Statute*].
3. *Nuremberg Rules, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 U.N.T.S. 279 (entered into force 8 August 1945).

II. DIFFICULTIES WITH APPLICABLE LAW AT THE *AD HOC* TRIBUNALS

While the statutes of the modern *ad hoc* tribunals are more detailed than the *Nuremberg Charter*[3] and the *Tokyo Charter*[4], they similarly did not include a definition of applicable law.[5] Some observers believe that this occurred because of "political considerations," namely that it would be difficult to obtain agreement among states on what law(s) should be applied.[6] M. Cherif Bassiouni has observed that matters that were unaddressed in the statutes of the legacy and modern *ad hoc* tribunals "have been dealt with on an *ad hoc* and sometimes in an improvised manner."[7]

There was no international criminal code in the mid-1990s when the *ad hoc* tribunals were created, national legal traditions varied in their identification of sources of criminal laws, and international humanitarian law offered no guidance on how to conduct a criminal trial. As a result, it was thought that resort to general public international law was a logical place to find broadly defined sources of international criminal law. Specifically, judges of the modern *ad hoc* tribunals adopted Article 38(1) of the *Statute of the International Court of Justice* as their own to provide a normative superstructure to define applicable sources of international criminal law:[8]

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4. *Charter of the International Military Tribunal for the Far-East* (proclaimed on 19 January 1946 by special proclamation of General MacArthur as the Supreme Commander in the Far East for the Allied Powers), online: The Avalon Project <http://www.yale.edu/lawweb/avalon/imtfech.htm>.

5. See *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, S.C. Res. 827, UN SCOR, 48th Sess., 3217th Mtg., Annex, UN Doc. S/827 (1993) [*ICTY Statute*], art. 2; *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighboring States*, S.C. Res. 955, UN SCOR, 49th Sess., 3453 Mtg., Annex, UN Doc S/955 (1994) [*ICTR Statute*], art. 4. (These statutes did, however, authorize the application of various international treaties, including grave breaches of the 1949 Geneva Conventions, which include: *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva Convention No. I), 12 August 1949, 75 U.N.T.S. 316; *Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea* (Geneva Convention No. II), 12 August 1949, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva Convention No. III), 12 August 1949, 75 U.N.T.S. 135; *Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva Convention No. IV), 12 August 1949, 75 U.N.T.S. 287, and, additionally in the case of the ICTR, serious violations of *Protocol II: Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 610.

6. M. Cherif Bassiouni, *Introduction to International Criminal Law* (Ardsley, NY: Transnational Publishers Inc., 2003) at 267.

7. *Ibid.* at 263.

8. See e.g. *Prosecutor v. Anto Furundzija*, IT-95-17/1-A, Declaration of Judge Patrick Robinson (21 July 2000) at note 10 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http:www.un.org.icty/cases-e/index-e.htm> [*Furundzija*]; *Prosecutor v. Drazen Erdemovic*, IT-96-22-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah (7 October 1997) at para. 40 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.un.org/icty/cases-e/index-e.htm> [*Erdemovic*, Judges McDonald and Vohrah]; *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Declaration of Judge David Hunt (24 March 2000) at note 1 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY

> Article 38
> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[9]

Commentators have explicitly indicated the need for these sources of law to be "subject to the principles of legality which derive from general principles of law . . . ."[10] Likewise, in interpreting their statutes, the modern *ad hoc* tribunals imported Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*[11] to provide the interpretive canons of international criminal law,[12] despite the fact that the statutes of these tribunals were created under United Nations (UN) Security Council resolutions and are not, strictly speaking, international treaties.

The implications of the modern *ad hoc* tribunals incorporating these public international law concepts into international criminal law have been largely ignored. Understanding the problems that arose in building the early foundation of this area of

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<http://www.un.org/icty/cases-e/index-e.htm>. See also *Prosecutor v. Laurent Semanza*, ICTR-97–20-A, Separate Opinion of Judge Shahabuddeen (31 May 2000) at note 20 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <http://www.ICTR.org>; *Prosecutor v. Jean Bosco Barayagwiza*, ICTR-97–19-AR72, Decision (Prosecutor's Request for Review of Reconsideration) (31 March 2000) at para. 20 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <http://www.ICTR.org>.

9. *Statute of the International Court of Justice* [1978] I.C.J. Acts & Doc. 5 at art. 38(1), online: International Court of Justice <http://www.icj-cij.org> [*ICJ Statute*].

10. Bassiouni, *supra* note 6 at 4.

11. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, arts. 31–32,Can.T.S. 1980 No. 37 [*Vienna Convention*].

12. See e.g. *Prosecutor v. Enver Hadzihasanovic et al.*, IT-01–47-PT, Decision on Joint Challenge to Jurisdiction (12 November 2002) at para. 63 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.un.org/icty/cases-e/index-e.htm>; *Prosecutor v. Dusko Tadic et al.*, IT-94–1-A, Judgment (15 July 1999) at para. 300 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.un.org/ICTY/cases-e/index-e.htm>; *Prosecutor v. Blagoje Simic et al.*, IT-95–9, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others (18 October 2000) at para. 47 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.un.org/icty/cases-e/index-e.htm>; *Prosecutor v. Slobodan Milosevic*, IT-02–54-T, Reasons for Decision on Assignment of Defence Counsel (22 September 2004) at para. 31 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.un.org/ICTY/cases-e/index-e.htm>. See also *Prosecutor v. Théoneste Bagosora and 28 Others*, ICTR-98–37-A, Decision on the Admissibility of the Prosecutor's Appeal From the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others (8 June 1998) at para. 28 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <http://www.ICTR.org>; *Prosecutor v. Joseph Kanyabashi*, ICTR-96–15-A, Joint Separate and Concurring Opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia (3 June 1999) at para. 11 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.ICTR.org>.

law helps us to identify persistent tensions within the emerging international criminal law tradition and serves as a baseline for assessing the approach to applicable law taken in the *Rome Statute*. The case law of the ICTY and the ICTR demonstrates the difficulties of importing general public international law doctrines designed to deal with legal disputes between states "based on a consensual relationship between co-equal sovereign states."[13]

A. Problems With Elaborating the Sources of International Criminal Law

With respect to sources of law, most of the difficulties arise with respect to Article 38(1)(c) of the *ICJ Statute*, which refers to "the general principles of law recognized by civilized nations."[14] In their Joint and Separate Opinions in *Erdemovic*, Judges McDonald and Vohrah of the ICTY Appeals Chamber state "that one purpose of this article is to avoid a situation of *non-liquet*, that is, where an international tribunal is stranded by an absence of applicable legal rules."[15] In actually deriving these general principles, these judges described their approach as follows:

> [I]t is generally accepted that the distillation of a "general principle of law recognised by civilised nations" does not require the comprehensive survey of all legal systems of the world as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals which have had recourse to Article 38(1)(c) of the ICJ Statute . . . . In light of these considerations, our approach will necessarily not involve a direct comparison of the specific rules of each of the world's legal systems, but will instead involve a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal.[16]

There are, however, several problems with the approach described by Judges McDonald and Vohrah, despite its obvious pragmatic justification. First, they provide no answer for how extensive a survey of national legal systems is required. In the same case, Judge Stephen held that "no universal acceptance of a particular principle by every nation within the main systems of law is necessary before lacunae can be filled; it is enough that 'the prevailing number of nations within each of the *main families of laws*' recognize such a principle."[17] By "families of laws," it is highly probable

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13. Bassiouni, *supra* note 6 at 11.
14. *ICJ Statute*, *supra* note 9, art. 38(1)(c).
15. *Erdemovic*, Judges McDonald and Vohrah, *supra* note 8 at para. 57.
16. *Ibid.*
17. *Prosecutor v. Drazen Erdemovic*, IT-96-22, Separate and Dissenting Opinion of Judge Stephen (7 October 1997) at para. 25 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.un.org/icty/cases-e/index-e.htm> [emphasis added] [*Erdemovic*, Judge Stephen].

that Judge Stephen is referring to the common and civil law traditions, in all but the rarest cases. Jurisdictions which are accessible "as a practical matter" clearly import institutional considerations into the equation. Indeed, law only travels where it is known and in a language that is understood by its adherents.[18]

Second, there may be a degree of incommensurability between the legal families or traditions towards which the modern *ad hoc* tribunals have turned to. There are significant theoretical and practical limitations in resorting to national laws, which are situated in vastly different legal systems, to resolve isolated and narrow questions for international criminal law. In *Simic*, Judge Hunt recognized this problem in the context of international rules of evidence:

> It is not easy to discover general principles of law in relation to this issue which are recognised by the domestic laws of (all) civilised nations. This is because most civil law systems have detailed statutory provisions in relation to evidence which is the subject of claims of confidentiality, whereas most common law systems leave it to the courts to determine where the balance lies between competing public interests. It is therefore necessary, in my view, to commence from first principles.[19]

In *Delalic*, the ICTY Trial Chamber approved a highly discretionary power of the judges to fill gaps in the rules of procedure and evidence by making eclectic use of national laws of their choice:

> Whilst not being bound by national rules of evidence, it seems to the Trial Chamber that the Chambers can, where appropriate, be guided by such national rules. Hence, *the Chambers may in their discretion apply rules of evidence which will best favour the determination of the matter before them.* In any case, such laws must be consistent with the spirit of the Statute and general principles of law.[20]

This approach is codified in Rule 89(B) of the Rules of Procedure and Evidence of both of the modern *ad hoc* tribunals, enacted by the judges of these tribunals:

> In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will *best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.*[21]

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18. H. Patrick Glenn, *On Common Laws* (Oxford: Oxford University Press, 2005) at 62 [Glenn, *On Common Laws*].
19. *Prosecutor v. Bladoje Simic et al.*, IT-95–9, Ex Parte and Confidential Separate Opinion of Judge David Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness (27 July 1999), at para. 24 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.un.org/icty/cases-e/index-e.htm> [*Simic*].
20. *Prosecutor v. Zejnil Delalic et al.*, IT-96–21, Decision on the Motion to Allow Witness K, L, and M to Give Their Testimony by Means of Video-Link Conference (28 May 1997) at para. 7 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.un.org/icty/cases-e/index-e.htm> [emphasis added] [*Delalic*].
21. *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, Rules of Procedure and Evidence, UN Doc. IT/32 (1994), as amended, r. 89(B). See also *International Criminal Tribunal for Rwanda*, Rules of Procedure and Evidence, UN Doc. ITR/3/Rev.1 (1995), as amended, r. 89(B) [emphasis added].

These statements differ sharply from a faithful application of Article 38(1) of the *ICJ Statute*, thus reinforcing the origins of international criminal law as driven by judicial discretion, given its long-standing absence of an external institutional framework to enact, amend and repeal the law that is applied.[22] To develop this point further, it is helpful to introduce a legal theory which offers an alternative explanatory perspective of the reasoning behind decisions of the modern *ad hoc* tribunals in difficult cases where lacunae in formal sources are apparent.

Patrick Glenn's theory of transnational common laws offers some promising insights when applied to international criminal law. According to Glenn, transnational common laws have "no obligatory or mandatory content," yield to particular laws (meaning that they largely fulfill a "gap filling" function), and depend on "persuasion and collaboration, amongst jurists, amongst judges."[23] While Glenn's theory has been "hampered by the idea that the source of all law is the nation-state,"[24] it has the potential for greater purchase in this emergent international tradition, which is not restrained by the exclusivity of the domestic law of any given state. The above statements interpreting the applicable law at the modern *ad hoc* tribunals come very close to applying these transnational common laws, which operate in the background and appear when hard cases present themselves.[25] Further evidence of this having taken place in practice is considered later, demonstrating that "transnational 'judicial dialogue'"[26] is part of the international criminal law tradition in order to transmit information. Indeed, the concept of "general principles of law" has been seen in other contexts to provide a "liaison" between national laws.[27] Similarly, Michèle Buteau and Gabriël Oosthuizen have sought to demonstrate that substantive and procedural lacunae in the statutes of the modern *ad hoc* tribunals are filled by resorting to the inherent, implied, or incidental powers of the judges to resolve such matters.[28] At this stage of development of the international criminal law tradition, the final component of Glenn's transnational common laws theory—"the recognition of different groups of people to whom different laws could be applied"[29]—has yet to fully materialize, but has the potential to do so at the ICC based on Article 21(1)(c) of the *Rome Statute*, as discussed further in Part III.

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22. In this regard, the creation of the Assembly of States Parties for the ICC is a major institutional development.
23. Glenn, *On Common Laws*, *supra* note 18 at 62, 45.
24. Glenn, "Transnational Common Laws," *supra* note 1 at 457.
25. Glenn, *On Common Laws*, *supra* note 18 at 20.
26. Glenn, "Transnational Common Laws," *supra* note 1 at 466.
27. Glenn, *On Common Laws*, *supra* note 18 at 49.
28. Michèle Buteau & Gabriël Oosthuizen, "When the Statute and Rules are Silent: The Inherent Powers of the Tribunal" in Richard May et al., eds., *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001) 65 at 80.
29. Glenn, *On Common Laws*, *supra* note 18 at 63. Glenn also refers to the theory as "relational common laws."

The hypothesis that judges at the modern *ad hoc* tribunals fill lacunae in international criminal law in a manner consistent with Glenn's transnational common laws theory, as opposed to adherence to Article 38(1) of the *ICJ Statute*, is likely to be controversial.[30] The aim at this stage, however, is not to provide a normative theory but a descriptive one. Glenn's theory is very different from engaging in a detailed comparative analysis of state practice and evidence of *opinio juris* for the purpose of declaring a *rule* of customary international law or finding a general principle of law within the meaning of Article 38(1)(b),(c) of the *ICJ Statute*. This distinction was implicitly recognized in *Furundzija* by Judge Robinson who began by noting that "[i]t is perfectly proper, therefore, to examine national decisions on a particular question in order to ascertain the existence of international custom,"[31] but then back-tracked to deny that any such use of national laws was being made in the judgment:

> Although the Judgement examines provisions in the European Convention on Human Rights, decisions of the European Court of Human Rights, decisions from some common law countries—the United Kingdom, Australia, South Africa and the United States—and observes the "trend in civil law jurisdictions," *it does not do so for the purpose of ascertaining whether there is any relevant rule of customary international law.*
> The finding which the Chamber makes based upon this examination is that 'there is a *general rule* that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.'[32]

B. The Implications of Public International Law Interpretive Doctrines

The serious implication of wholesale importation of general public international law interpretive doctrines into the international criminal law tradition has also been largely unexplored. While a comparative analysis of Articles 31 and 32 of the *Vienna Convention* and national criminal law doctrines of interpretation is beyond the scope of the present analysis, it suffices to recognize that important variances exist, flowing from the basic fact that international rules of interpretation are of general application to disputes between states and do not typically involve the liberty interest of individuals. These international interpretive doctrines are intended to be fairly exhaustive, authorizing extensive use of supplementary materials where required. The consequences of these realizations for international criminal proceedings have already become apparent at the ICTY.

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30. One of the most ardent opponents of this view would be Judge Cassese who stated that "[w]henever reference to national law is not commanded expressly, or imposed by necessary implication, resort to national legislation is not warranted." Also, where national laws must be considered, Judge Cassese notes that "the normal attitude of international courts is to try to assimilate or transform the national law notion so as to adjust it to the exigencies and basic principles of international law." *Prosecutor v. Drazen Erdemovic*, IT-96–22, Separate and Dissenting Opinion of Judge Cassese (7 October 1997), at para. 3 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.un.org/icty/cases-e/index-e.htm> [*Erdemovic*, Judge Cassese].

31. *Furundzija*, *supra* note 8 at para. 281.

32. *Ibid.* at paras. 285–86 [emphasis added].

Defence counsel in *Hadzihasanovic* challenged the use of Articles 31 and 32 of the *Vienna Convention*[33] before the ICTY Appeals Chamber. In that case, it was argued that "the object and purpose of the [ICTY] Statute cannot be relied upon to determine whether command responsibility in the context of internal armed conflicts was law in 1993."[34] The unspoken assumption in this statement relates back to the seemingly irreconcilable aims of extending humanitarian protection and ensuring full respect for the rights of the accused. In that case, defence counsel implicitly argued that the UN Security Council did not have the power to criminalize behaviour that was not illegal at the time, even if it would extend humanitarian protection, because to do so would violate the principle of legality.

In a partial dissenting opinion in this case, Judge Shabuddeen explicitly discussed the relationship between the interpretive rules set out in the *Vienna Convention* and the maxim *in dubio pro reo* (uncertainty in the law must be interpreted in favour of the accused). Due to the relative exhaustiveness of international interpretive doctrines, the maxim which is a fundamental interpretive principle in many national systems was essentially eviscerated, demonstrating the repercussions of relying on public international law interpretive canons to resolve international criminal law issues:

> Paragraph 120 of the interlocutory appeal pleads that "[u]ncertainty in the law must be interpreted in favour of the accused." As I understand the injunctions of the maxim *in dubio pro reo* and of the associated principle of strict construction in criminal proceedings, those injunctions operate on the result produced by a particular method of interpretation but do not necessarily control the selection of the method. *The selection of the method in this case is governed by the rules of interpretation laid down in the Vienna Convention on the Law of Treaties.* It is only if the application of the method of interpretation prescribed by the Convention results in a doubt which cannot be resolved by recourse to the provisions of the Convention itself—*an unlikely proposition*—that the maxim applies so as to prefer the meaning which is more favourable to the accused. In my view, that is not the position here: there is no residual doubt.[35]

At the same time that the modern *ad hoc* tribunals have grappled with using public international law sources and doctrines to enforce international humanitarian law, they have had to deal with a growing body of international human rights law.

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33. *Vienna Convention*, *supra* note 11, arts. 31–32.

34. *Prosecutor v. Enver Hadzihasanovic et al.*, IT-01-47-PT, Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction (Defence Motion) (27 November 2002) at paras. 94–96 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.un.org/icty/cases-e/index-e.htm>.

35. *Prosecutor v. Enver Hadzihasanovic et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Partial Dissenting Opinion of Judge Shahabudden (16 July 2003) at para. 12 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.un.org/icty/hadzihas/appea;/decision-e/030716.htm> [emphasis added].

C. International Human Rights Law as a Dynamic Normative Force

The expansion of international human rights law after World War II, created and codified in large measure through international treaties, has played a significant and ongoing role in generating norms that have infused the international criminal law tradition since the advent of the modern *ad hoc* tribunals. This has been particularly important to international criminal procedure, but has infused various aspects of substantive law as well. The ICTY Trial Chamber went so far as to state in *Furundzija* that "[t]he general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law."[36]

After the creation of the United Nations, a litany of treaties were adopted and resolutions were passed to expand the body of international human rights law. By the time the modern *ad hoc* tribunals were created, international standards for the fair and proper conduct of criminal proceedings in national courts had already taken on a transnational character, making it impossible for international criminal tribunals to ignore these standards.[37] These norms continue to develop, evolving independently of international criminal proceedings through international human rights bodies, regional human rights courts and national courts. For example, the statutes of the modern *ad hoc* tribunals, which were adopted by the UN Security Council, include detailed provisions guaranteeing the rights of the accused which are largely taken from Article 14 of the *International Covenant on Civil and Political Rights*.[38]

Richard May and Marieke Wierda argue that trial fairness, as understood in international human rights law, has been the factor motivating the modern *ad hoc* tribunals to reconcile differences in national legal traditions. May and Wierda also argue that regional human rights law, in particular as expounded by the jurisprudence of the European Court of Human Rights, has proven to be a powerful normative source of international criminal law *principles* of evidence and procedure, such as the concept of "equality of arms."[39] Christoph Safferling takes the argument one step further, arguing that the only way to bridge the gap between common and civil legal tradi-

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36. *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, Judgement (10 December 1998) at para. 183 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II), online: ICTY <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf>.
37. Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003) at 246.
38. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976). See *ICTY Statute*, *supra* note 5, art. 21, and *ICTR Statute*, *supra* note 5, art. 20.
39. Richard May & Marieke Wierda, "Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha" (1999) 37 Colum. J. Transnat'l L. 725 at 728, 733, and n. 22.

tions at the international level is "to find a consensus in a truly international criminal procedure that all states can accept. In order to achieve this, the discussion must begin with what states have already accepted, that is, universal human rights."[40] This suggests that there is added strength on the side of ensuring fairness to the accused in the international criminal law tradition, perhaps at the cost of extending humanitarian protection—the other competing aspect in this tension. Indeed, the normative thrust of international human rights law has now been formally entrenched in Article 21(3) of the *Rome Statute*, which is discussed in detail in Part III, as part of this broader trend in international criminal law. This provision states in part that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights . . . ."[41]

D. Filling Gaps in Applicable Law in Practice

Moving from these theoretical findings, the following examines a selective review of the jurisprudence of the modern *ad hoc* tribunals in which gaps have arisen due to strict adherence to the public international law sources and interpretive doctrines discussed above. This is relevant for three reasons: first, it suggests that the balance in the international criminal law tradition between extending humanitarian protection and maximizing fairness to the accused has been highly variable; second, it shows that lacunae in international criminal law do not exist merely where there is no definition of applicable law, but rather are a systematic concern that has not been addressed by the adoption of a *de facto* articulation of applicable law (i.e. Article 38(1) of the *ICJ Statute*, discussed above). Therefore, there is no basis to assume that a *de jure* articulation of sources of law, as in Article 21 of the *Rome Statute*, will definitively address this concern;[42] and third, this inquiry demonstrates that problems arising from the hybrid character of international criminal law have been dealt with, at least in part, by judges at the modern *ad hoc* tribunals treating national laws as constituting *transnational common laws* (as described by Glenn, above) which the judges have drawn upon based on their persuasive force. In this way, Article 21(1)(c) of the *Rome Statute*, discussed in Part III, can be understood as reflecting a codification of this approach which eschews the prospect of deriving *rules* of international custom from national laws, in favour of "*general principles* of law derived by the Court from national laws of legal systems of the world . . . ."[43] Over time, the cumulative effect of international judicial decision-making on this basis is a body of persuasive jurisprudence, such that

40. Christoph J. M. Safferling, *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2001) at 366.
41. *Rome Statute*, *supra* note 2, art. 21(3).
42. This specific hypothesis is examined in Part III.
43. *Rome Statute*, *supra* note 2, art. 21(1)(c) [emphasis added].

resort to national laws has become less and less necessary at the modern *ad hoc* tribunals. As will be discussed in Part III, this process of building an international criminal law tradition on the basis of persuasive, non-binding decisions has been entrenched in Article 21(2) of the *Rome Statute*.[44]

1. *Problems in Identifying International Custom*

In many respects, the ICTY Appeals Chamber's decision on jurisdiction in *Tadic* is a foundational case for the modern *ad hoc* tribunals, in large part because it is one of the very first decisions rendered by an international criminal tribunal since the post-World War II proceedings. This decision also affords a typical example of the way in which these tribunals have approached the task of invoking various sources of law to resolve questions that are not answered in the formal law of these tribunals (i.e. the relevant provisions in their statutes, and Rules of Procedure and Evidence).

In *Tadic*, the ICTY Appeals Chamber held that violations of customary rules governing internal armed conflicts may incur individual criminal responsibility. It reached this conclusion—which, *inter alia*, extended the rule in international armed conflicts established by the International Military Tribunal—by implicitly invoking the Martens clause,[45] stating:

> Principles and rules of humanitarian law reflect 'elementary considerations of humanity' widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.[46]

Placing the Martens clause, whose role in international criminal law has been historically challenged,[47] so centrally in this decision has the effect of inserting a dynamic normative vehicle for extending humanitarian protection in international criminal law, clearly at the expense of the competing interests of ensuring fairness to the accused. Without the *Tadic* decision on jurisdiction, many of the indictments issued by the ICTY would be invalid.

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44. See *Rome Statute*, *ibid.*, art. 21(2) which provides: "The Court *may* apply principles and rules of law as interpreted in its previous decisions" [emphasis added].

45. The Martens clause is named after the Russian delegate who first proposed it at the Hague Peace Conference in 1899, stating: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, *from the laws of humanity, and the requirements of public conscience*" [emphasis added]. Cited in Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience" (2000) 94 Am. J. Int'l L. 78 at 79.

46. *Prosecutor v. Dusko Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para. 129 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> [*Tadic*, Appeal on Jurisdiction].

47. See "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" (1920) 14 Am. J. Int. L. 95 at 122 , cited in Sheldon Glueck, *War Criminals, Their Prosecution & Punishment* (New York: Alfred A. Knopf, 1944) at 22; and Meron, *supra* note 45 at 88.

The ICTY Appeals Chamber in *Tadic* further added that customary international law arrives at the same conclusion. State practice in the following jurisdictions was cited: Belgium (statute); Germany (military manual); New Zealand (military manual); United States (military manual); United Kingdom (military manual); former Socialist Federal Republic of Yugoslavia (criminal code); the Republic of Bosnia and Herzegovina (decree law); and Nigeria (military manual, court martial and civilian court decisions).[48] With respect to *opinio juris*, the Appeals Chamber relied solely on several UN Security Council resolutions regarding the situation in Somalia.[49] The parties to the conflict in Bosnia-Herzegovina were also found to have agreed in a treaty to punish violations of international humanitarian law committed in the internal armed conflict.[50]

The ICTY's approach to identifying this very significant rule of customary international law can hardly be classified as rigorous in either its depth or breadth of analysis. Only eight jurisdictions were considered, just one of which was a non-Western country. The persuasiveness of relying so heavily on the state practice of jurisdictions which have not had to deal with internal armed conflicts is troubling. Other than in the analysis of Nigerian law, there is only cursory citation of provisions in military manuals and national legislation, and no doctrinal support or analysis is provided to lend credibility to the ICTY's interpretation of these provisions. Again, other than a few Nigerian cases, the actual uses of the legislative provisions that exist to purportedly punish violations of international humanitarian law in internal armed conflict are absent. Furthermore, no link is made whatsoever between state practice, on the one hand, and *opinio juris* on the other. They are disjunctively treated—not linked in either time or jurisdictional space.

Similar observations apply to the ICTR's reasoning in *Kabiligi*. In that case, defence counsel claimed, *inter alia*, that the indictment was defective on the grounds that it dealt with allegations before the temporal jurisdiction of the ICTR. The Trial Chamber decided that "[a]s to the conspiracy charge . . . the limited temporal jurisdiction of the Tribunal does not bar evidence of an alleged conspiracy of which the agreement was made before 1994."[51] In arriving at this conclusion, the Trial Chamber relied on an Australian doctrinal text, case law of the House of Lords, and a decision of a U.S. military tribunal. Based on these sources of law, the Trial Chamber concluded that the law on conspiracy as it applies to temporal jurisdiction was "clear from the authorities."[52]

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48. *Tadic*, Appeal on Jurisdiction, *supra* note 46 at paras. 106, 125 and 130–32.
49. *Ibid.* at para. 133.
50. *Ibid.* at para. 136.
51. *The Prosecutor v. Gratien Kabiligi et al..*, ICTR-96–34-I, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void Ab Initio (13 April 2000) at para. 39 (International Criminal Tribunal for Rwanda, Trial Chamber III), online: ICTR <http://69.94.11.53/ENGLISH/cases/Kabiligi/decisions/dcs20000413.htm>.
52. *Ibid.* at para. 43.

The foregoing critique is significant because it fundamentally questions the theoretical basis for seeking out customary international law *rules* to be applied in the international criminal law tradition. It also suggests that the balance in this tradition between extending humanitarian protection versus maximizing principles of a fair defence has been strongly influenced by developments in international humanitarian law and international human rights law—a trend confirmed by the *Erdemovic* case, discussed below.

2. Reconciling Differences Between National Legal Traditions

A critical review of the jurisprudence of the modern *ad hoc* tribunals reveals many instances where judges were required to answer questions which were unaddressed in the formal law (i.e. the Statutes and Rules of Procedure and Evidence) of the respective tribunals by resorting to national laws—which themselves were vastly different or seen to be in conflict. Given such a divergence or conflict among national legal sources, it cannot be argued that these judges were applying international customary law, or "general principles of law." Yet they arrived at a definitive statement of the law, sometimes opting to follow one legal tradition over another, and at other times fashioning their own articulation of the appropriate rule. This body of practice offers strong evidence of a basic element of the international criminal law tradition: that it is largely based on judicial discretion in difficult cases, exercised consistent with Glenn's theory of transnational common laws, and often based on favouring either extending humanitarian protection or enhancing fairness to the accused.

The ICTY Trial Chamber decision on hearsay in *Tadic* is paradigmatic of the above hypothesis. In that case, the parties disagreed on whether the common law or civil law approach should prevail when resolving a legal question not explicitly addressed in the Tribunal's Rules of Procedure and Evidence. Defence counsel recognized that national rules of evidence do not bind the ICTY, but argued that the adversarial system of trial is more similar to common law jurisdictions, which generally presumptively exclude hearsay evidence, with exceptions only where its probative value substantially outweighs its prejudicial effects.[53] On the other side, the prosecution argued that ICTY judges are finders of fact in a manner akin to professional civilian judges, where all relevant evidence is generally admissible.[54] In resolving this impasse, the Trial Chamber noted that there was no general rule excluding hearsay in the ICTY Rules of Procedure and Evidence, and cited Rule 89, discussed earlier.[55] The Trial Chamber proceeded to examine the divergent civil and common law approach-

53. *Prosecutor v. Dusko Tadic*, IT-94–1-T, Decision on Defence Motion on Hearsay (5 August 1996) at para. 2 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Tadic*, Hearsay Decision].

54. *Ibid.* at para. 3.

55. *Ibid.* at paras. 4–6.

es to hearsay evidence, and noted that the ICTY itself is a "unique amalgam of civil and common law features."[56] In articulating its approach to hearsay evidence under international criminal law, the Trial Chamber stated that it would admit relevant evidence which has probative value, "focusing on its reliability"[57] such that it "may be guided by, but not bound to, hearsay exceptions generally recognized by some national legal systems."[58] Therefore, the Trial Chamber developed a *sui generis*[59] articulation of the law on hearsay by drawing from both common and civil law traditions—but not adopting either completely—and justified this approach as falling within the scope of its Rules of Procedure and Evidence, and as being "the most efficient and fair method."[60] Indeed, a recent survey of ICTY and ICTR jurisprudence on evidentiary law has confirmed that judges play a prominent law-making role in reconciling national legal traditions.[61] There was no attempt by the ICTY Trial Chamber to justify its solution as being a "rule of international customary law" or "general principle of law." The *Tadic* decision on hearsay may thus be viewed as a case of reconciling national legal traditions which are non-binding, but persuasive sources of law for international criminal law.

In the *Erdemovic* decision on duress, it was not simply the parties, but also the judges of the ICTY Appeals Chamber which were split on whether duress constituted a complete defence to war crimes or crimes against humanity involving the killing of innocent people. The five-member panel agreed that this question was unresolved in the ICTY Statute, Rules of Procedure and Evidence and international treaties. They also agreed that there was a rift between civilian jurisdictions that permitted duress as a complete defence to all offences, and common law jurisdictions that generally denied duress in cases of murder but treated it as a mitigating factor at sentencing. Despite this consensus, there was deep division in the Appeals Chamber regarding the basis on which the issue should be resolved, and four separate opinions were rendered.

The majority in *Erdemovic*, composed of Judges McDonald, Vohrah and Li, found "that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings."[62]

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56. *Ibid.* at para. 14.
57. *Ibid.* at para. 19.
58. *Ibid.*
59. This language was not formally used until the 1997 decision in *Prosecutor v. Zejnil Delalic et al.*, IT-96–21, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo (1 May 1997) at para. 15 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.un.org/icty/celebici/trialc2/decision-e/70501DE2.htm>.
60. *Tadic*, Hearsay Decision, *supra* note 53 at para. 19.
61. See May & Wierda, *supra* note 39 at 727: "Thus, the presentation of evidence has followed the 'adversarial' model, whereas the rules governing the admissibility of evidence may be seen as more akin to the 'inquisitorial' model and leave wide discretion to the judges."
62. *Prosecutor v. Drazen Erdemovic*, IT-96–22-A, Judgement (7 October 1997) at para. 19 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.un.org/icty/erdemovic/appeal/judgement/erd-aj971007e.pdf >.

They resolved the gap in international criminal law by explicitly resorting to "practical policy considerations," namely the imperative of extending humanitarian protection to deny duress as a defence to the killing of innocent people. Judges Cassese and Stephen dissented, each writing separate opinions. Judge Cassese's denial of ambiguity in international criminal law on this issue is suspect, and his admission that if there was ambiguity, it should be resolved in favour of the accused is quite telling. For its part, Judge Stephen's dissenting opinion mirrors Glenn's theory of transnational common laws, with the civil law approach to duress being more persuasive and suitable to ensuring fairness to the accused.

Judges McDonald and Vohrah began their analysis by citing Article 38 of the *ICJ Statute* under a heading entitled "The Applicable Law."[63] They considered customary international law and general principles of law to ascertain whether duress could be a defence to the alleged offence. In evaluating the state of customary international law, case law of the post-World War II military tribunals was evaluated. The *Einsatzgruppen* decision of the U.S. Military Tribunal was challenged for failing to cite any authority for its holding that duress could be a complete defence.[64] They also rejected judicial decisions from Germany, Belgium, Israel, France, the former U.S.S.R., the former Yugoslavia, and Italy, which had been offered to support the view of duress as a complete defence.[65] Turning to national legislation, they found there was no uniform state practice. They observed the clear split between the civil and common law traditions on this issue. Defence counsel provided evidence that at least 14 civil law jurisdictions (including the former Yugoslavia) permit necessity or duress to be exculpatory for all crimes.[66] However, Judges McDonald and Vohrah noted that common law jurisdictions reject duress as a defence to murder, with the exception of "a few states" in the U.S..[67] They were unable to reconcile the diverse approaches in national law, stating:

> It is clear from the differing positions of the principal legal systems of the world that there is no consistent concrete rule which answers the question whether or not duress is a defence to the killing of innocent persons. It is not possible to reconcile the opposing positions and, indeed, we do not believe that the issue should be reduced to a contest between common law and civil law.[68]

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63. *Erdemovic*, Judges McDonald and Vohrah, *supra* note 8 at para. 40.
64. *Ibid.* at para. 43, citing the U.S. Military Tribunal, which held: "Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever."
65. *Ibid.* at paras. 47–48.
66. *Ibid.* at para. 49. The jurisdictions cited included Austria, Belgium, Brazil, Greece, Italy, Finland, the Netherlands, France, Germany, Peru, Spain, Switzerland, Sweden and the former Yugoslavia.
67. *Ibid.*
68. *Ibid.* at para. 72.

To set out an applicable rule governing duress in the case, Judges McDonald and Vohrah appealed to the "normative mandate for international criminal law."[69] In so doing, they explicitly opted to decide the case based on extending humanitarian protection, arguably at the expense of ensuring fairness to the accused, stating:

> [W]e are operating in the realm of international humanitarian law which has, as one of its prime objectives, the protection of the weak and vulnerable in such a situation where their lives and security are endangered . . . . *It must be our concern to facilitate the development and effectiveness of international humanitarian law and to promote its aims and application* by recognising the normative effect which criminal law should have upon those subject to them.[70]

While rejecting duress as a defence on the basis of the policy underlying international humanitarian law, Judges McDonald and Vohrah still gave some credence to the competing tension of international human rights law with respect to fairness to the accused, noting that English judges have recognized that duress can operate as a mitigating factor at sentencing.[71] Judges McDonald and Vohrah were unapologetic in their explanation of the final basis for their decision to deny duress as a defence to the offences alleged, indicating it is not grounded, strictly speaking, in pre-existing law:

> We do not think our reference to considerations of policy are improper. It would be naive to believe that international law operates and develops wholly divorced from considerations of social and economic policy . . . . The approach we take does not involve a balancing of harms for and against killing but rests upon an application in the context of international humanitarian law of the rule that duress does not justify or excuse the killing of an innocent person.[72]

Similarly, Judge Li's concurring opinion was founded largely on extending humanitarian protection, but also explicitly drew on those national laws which are "best suited" to the context of the case. This approach demonstrated resort to the persuasiveness of transnational common laws, such that "this International Tribunal cannot but opt for the solution best suited for the protection of innocent persons."[73] The majority decision in *Erdemovic*, therefore, cannot be said to be grounded in Article 38(1) of the *ICJ Statute*, as these general doctrines of public international law failed to provide an answer to the fundamental question at stake in *Erdemovic*, at least according to the majority's reasoning.

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69. *Ibid.* at para. 73.
70. *Ibid.* at para. 75 [emphasis added].
71. See *ibid.* at paras. 86–87.
72. *Ibid.* at paras. 78, 80.
73. *Prosecutor v. Drazen Erdemovic*, IT-96-22-A, Judgement, Separate and Dissenting Opinion of Judge Li (7 October 1997) at para. 8 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojli971007e.htm>.

On the other side of the debate, Judge Cassese held in his dissenting opinion that "international criminal law on duress is not ambiguous or uncertain."[74] He proceeded by identifying four conditions which must be satisfied in order for duress to provide a defence under international criminal law, based on "[t]he relevant case-law [which] is almost unanimous"[75] (i.e. severity of threat, no means of escape, proportionality of means taken, and threat not self-induced). The case law cited by Judge Cassese consisted of several decisions of the post-World War II military tribunals, and national decisions from the Netherlands, Israel and Canada.[76] These provided, according to Judge Cassese's reasoning, for a "general rule" of customary international law that duress may offer a defence to an accused. Judge Cassese described the prosecution as attempting to fashion an exception in customary international law to disallow duress as a defence for offences involving the killing of innocent persons.[77] Judge Cassese argued that "no special customary rule has evolved in international law on whether or not duress can be admitted as a defence in case of crimes involving the killing of persons."[78] The logic applied by Judge Cassese on this point is questionable. It could just as easily be argued that a general rule of international criminal law is that the individual criminal responsibility of an accused can only be justified or excused based on a defence recognized under international law. Since duress is not recognized as a defence to the offences charged, and Judge Cassese falls short of finding a specific rule permitting duress as a defence to the killing of innocent persons, then the purported defence would not exist.

Judge Cassese is harsh in his criticism of the majority opinions, which he characterized as being based solely on "practical policy considerations."[79] While rejecting policy considerations as a relevant basis of decisions by international criminal tribunals, Judge Cassese nevertheless buttresses his position by invoking what could reasonably be called policy considerations, stating that law "should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below those standards."[80] In a very revealing passage, Judge Cassese stated that if there was ambiguity or a gap in international criminal law concerning duress, then it would "be appropriate and judicious to have recourse—as a last resort—to the national legislation of the accused, rather than to moral considerations or policy-oriented principles," given that the accused was "required to know those national criminal provisions and base his expectations on

74. *Erdemovic*, Judge Cassese, *supra* note 30 at para. 49.
75. *Ibid.* at para. 16.
76. *Ibid.* at note 10.
77. *Ibid.* at para. 18.
78. *Ibid.* at para. 40.
79. *Ibid.* at para. 11.
80. *Ibid.* at para. 47.

their contents."[81] However, no authority is cited by Judge Cassese for filling gaps in international criminal law by applying the national law of the accused. Instead, he refers to the maxim *in dubio pro reo* (resolving doubt in favour of the accused).[82]

In the final dissenting opinion in *Erdemovic*, Judge Stephen disputed the persuasive authority of the post-World War II jurisprudence on the grounds that they merely applied the national law with which they were most familiar.[83] Judge Stephen examined general principles of law as articulated in Article 38(1)(c) of the *ICJ Statute*, agreeing with the approach of Judges McDonald and Vohrah regarding the ability of general principles to fill lacunae in international law.[84] Characterizing the divergence of the common law and civilian tradition on this issue, Judge Stephen simply indicated preference for the latter and justified this position based on favouring the tension within international criminal law of ensuring fairness to the accused, "not only because of the approach of the civil law but also *as a matter of simple justice*."[85] Judge Stephen rejected the competing principle of extending humanitarian protection, stating that it "is not achieved by the denial of a just defence to one who is in no position to effect by his own will the protection of innocent life."[86] This reasoning shows hints of a rare attempt to harmonize the competing aims of international criminal law.

However, in a series of questionable moves, Judge Stephen seeks to declare a general principle of law recognizing duress as a defence on the basis that a "general principle governing duress is therefore more likely to be found in these general rules [i.e. civil rules] than in specific exceptions which exist for particular crimes [i.e. common law rules]."[87] With respect, this is merely a play-on-words with the word "general" in "general principles of law." The existence of exceptions to rules of law in national systems cannot reasonably invalidate those national laws from analysis. To the contrary, their divergence from other approaches which do not recognize such exceptions makes it more difficult to declare that a general principle of law exists. Based on the preceding analysis, Judge Stephen purported to declare a narrow general principle of law that could perhaps enable duress to operate on the facts alleged by the accused in the case.[88]

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81. *Ibid.* at para. 49.
82. *Ibid.*
83. In *Erdemovic*, Judge Stephen, *supra* note 17 at para. 24, Judge Stephen held: "The post-Second World War military tribunals do not appear to have acted in relation to duress in conscious conformity with the dictates of international law."
84. *Ibid.* at para. 25.
85. *Ibid.* at para. 26 [emphasis added].
86. *Ibid.* at para. 65.
87. *Ibid.* at para. 63.
88. *Ibid.* at para. 66.

The *Erdemovic* decision, therefore, represents a microcosm of the difficulties of enforcing international humanitarian law through international criminal trials. It is a harbinger of the fundamental questions governing the guilt or acquittal of an accused which are likely to continue to fall within the gaps of international criminal law.

3. *Precedent and an International Criminal Jurisprudence*

Once they have been made, what role do national and international judicial decisions play in the international criminal law tradition? Consistent with Glenn's theory of transnational common laws, we would expect them to play a persuasive, but non-binding role. This is largely the approach which has been taken at the modern *ad hoc* tribunals.

With respect to judicial decisions made outside its Chambers, the ICTY has not considered itself to be "bound" by the decisions of other international courts or tribunals such as the International Military Tribunal or International Military Tribunal for the Far East (IMTFE),[89] but has stated that these are more persuasive than national decisions:

> In sum, international criminal courts such as the International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgements, as the latter are at least based on the same *corpus* of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation.[90]

In terms of its own jurisprudence, the treatment to be given to prior decisions of the Trial and Appeals Chambers of the modern *ad hoc* tribunals is not explicitly addressed in either their Statutes or Rules of Procedure and Evidence.[91] This situation presents a dilemma given the position on this issue of various streams which feed into the international criminal law tradition. While higher courts in the common law tradition may bind lower courts by their decisions, there is no similar legal requirement in the civil law tradition.[92] In public international law, as in Article 59 of the *ICJ Statute*,[93] the doctrine of binding precedent is not strongly conceived.

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89. *Prosecutor v. Zoran Kupreskic*, IT-95–16, Judgement (14 January 2000) at para. 540 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm> [*Kupreskic*].
90. *Ibid.* at para. 542.
91. Claire Harris, "Precedent in the Practice of the ICTY" in May *et al.*, *supra* note 28, 341 at 341.
92. Discussed in *Prosecutor v. Zlatko Aleksovski*, IT-95–14/1, Judgement (24 March 2000) at para. 112 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.un.org/icty/aleksovski/appeal/judgement/index.htm> [*Aleksovski*, Appeals Judgement].
93. *ICJ Statute*, *supra* note 9, art. 59 states: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

In 2000, the ICTY Appeals Chamber in *Aleksovski* definitively stated that the "*ratio decidendi* of its decisions is binding on Trial Chambers" owing to: the hierarchical structure of the tribunal; the need to ensure "certainty and predictability in the application of the applicable law;" fairness to the accused because like cases must be treated alike (favouring one of the fundamental poles in the international criminal law tradition); and the intention of the UN Security Council in creating the tribunals which "envisaged a tribunal comprising three trial chambers and one appeals chamber, applying a single, unified, coherent and rational corpus of law."[94] With respect to decisions of Trial Chambers, the Appeals Chamber essentially adopted the shared common law and civil law approach, stating that other Trial Chambers may find such decisions to be persuasive, but that they "have no binding force on each other."[95]

The fundamental question of whether the Appeals Chamber is bound by its own prior decisions was also addressed in *Aleksovski*, where the prosecution argued for the common law position of *stare decisis* which is only departed from if a previous decision is "clearly erroneous and cannot stand."[96] On the other hand, the defence argued that "the Tribunal may apply only rules of international humanitarian law which are beyond any doubt part of customary law, and the Report [of the UN Secretary General creating the ICTY] makes no mention of judicial precedent as a source of law."[97] Resolving this question, the Appeals Chamber observed that "[t]he trend which emerges from an examination of common law jurisdictions is that their highest courts will normally consider themselves bound by their previous decisions, but reserve the right to depart from them in certain circumstances."[98] While the highest courts in civilian jurisdictions tend in practice to follow their prior decisions, the Appeals Chamber noted that this is not because such decisions are viewed as binding.[99] International courts similarly do not have a notion of binding precedent, but afford their prior decisions significant weight. The Appeals Chamber found this practice to be non-determinative, and instead resolved the issue based on the need for "certainty, stability and predictability in criminal law"[100] and the right of the accused to a fair trial which includes the right of appeal where like cases are treated alike as well as where errors of law in past appellate decisions are corrected.[101] The ultimate rule adopted in *Aleksovski*, therefore, was that "the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice."[102]

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94. *Aleksovski*, Appeals Judgement, *supra* note 92 at para. 113.
95. *Ibid.* at para. 114.
96. *Ibid.* at para. 122.
97. Harris, *supra* note 91 at 346.
98. *Aleksovski*, Appeals Judgement, *supra* note 92 at para. 92.
99. *Ibid.* at para. 93.
100. *Ibid.* at para. 101.
101. *Ibid.* at paras. 104–06.
102. *Ibid.* at para. 107.

The approach of the ICTY Appeals Chamber in *Aleksovski* to the nature of prior Appeals Chamber decisions may be seen as an attempt to reconcile the typically competing aspects of the international criminal law tradition. By ensuring that decisions of the Appeals Chamber are binding on Trial Chambers, and should generally be followed by subsequent Appeals Chambers, international criminal law can develop over time and be applied clearly and concisely, thus enhancing humanitarian protection. Likewise, the rule encourages fairness to the accused by ensuring that like cases are treated alike, but allows for the exception that a prior Appeals Chamber decision may be disregarded where it is contrary to the interests of justice. This test, no doubt, involves a high degree of judicial discretion.

Moving forward, it is pertinent to consider the extent to which the jurisprudence of the modern *ad hoc* tribunals may serve as persuasive, non-binding precedent for the ICC. Only time will reveal the ultimate answer to this question, but it is already apparent in the *Rome Statute* that some of the case law of the modern *ad hoc* tribunals has been set aside. For example, the majority decision in *Erdemovic* regarding the defence of duress was not followed in the drafting of the defences section of the *Rome Statute*.[103] Furthermore, how will the decisions of the ICC Pre-Trial Chamber, Trial Chamber, and Appeals Chamber be treated in other cases before the ICC? Article 21(2) of the *Rome Statute* appears to retreat from the common law tradition and the modern *ad hoc* tribunals, instead favouring an approach of mere persuasive authority akin to the civil tradition, stating: "[t]he Court *may* apply principles and rules of law as interpreted in its previous decisions."[104]

E. Legacy of the Legal Architecture of the ICTY and ICTR

While the creation of the modern *ad hoc* tribunals makes it possible to conceive of an emergent international criminal law tradition, the foregoing analysis shows that attempts to theoretically define sources of law and interpretive principles solely by reference to public international law has been insufficient. In practice, gaps which have emerged in the *de facto* definition of applicable law taken from Article 38 of the *ICJ Statute* have been filled by judicial discretion, drawing upon persuasive, non-binding precedent from transnational common laws. In some cases, the persuasive rationale went unstated by judges, or weak attempts have been made to justify their decisions as fully consistent with general principles of public international law. Notable instances in the jurisprudence have been presented to demonstrate that the fundamental debate in the international criminal law tradition between enhancing humanitarian protection versus ensuring fairness to the accused has been the turning

103. Geert-Jan Alexander Knoops, *An Introduction to the Law of the International Criminal Tribunals* (Ardsley: Transnational Publishers, Inc., 2003) at 74. See *Rome Statute*, *supra* note 2, art. 31(1)(d).

104. *Rome Statute*, *ibid.*, art. 21(2) [emphasis added].

point in difficult cases. In rare instances, there have been attempts to reconcile these competing aims which have been at the core of the international criminal law tradition since its birth. As these decisions have accumulated at the modern *ad hoc* tribunals, a basic system of precedent has been adopted to attempt to achieve an agenda of reconciling these aims.

Why, then, has the recent trend in international criminal law since the modern *ad hoc* tribunals been to attempt to codify the sources of applicable law, alter the ways in which this body of law should evolve, and revise the type of precedent which should apply?[105] In particular, how does Article 21 of the *Rome Statute* differ from the approach that has prevailed at the modern *ad hoc* tribunals? Does it purport to fill gaps in international criminal law and, if so, how effective is it likely to be in doing so? How does this protection affect the fundamental tensions in the international criminal law tradition between enhancing humanitarian protection versus ensuring fairness to the accused? How could the notion of transnational common laws operate at the ICC consistent with, or in spite of, Article 21 of the *Rome Statute*? What is the nature of past decisions of the ICC in this new system?

III. An Experimental Approach to Applicable Law: Article 21 of the *Rome Statute*

The project of creating a permanent international criminal court has a long history, but only really gained traction around the same time that the first modern *ad hoc* tribunal was being established. Owing to the fact that the negotiation process of drafting a statute for the ICC took place alongside the developments discussed in Part II, the modern *ad hoc* tribunals continued to promulgate important jurisprudence well after the *Rome Statute* was finalized. The thinking that went into the ICC represents an effort to build on the early lessons from these tribunals, as well as an independent exercise in redefining the international criminal law tradition, without the benefit of the full experience of the modern *ad hoc* tribunals. There are many important differences between the *Rome Statute* and the substantive, procedural and evidentiary law

105. See e.g. *Rome Statute*, *ibid.*, art. 21; United Nations Transitional Administration in East Timor, Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15 (6 June 2000), s. 3, online: United Nations <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>; Special Court for Sierra Leone, *Rules of Procedure and Evidence*, adopted 16 January 2002, as amended to 14 May 2005, r. 72*bis*, online: SCSL <http://www.sc-sl.org/rulesofprocedureandevidence.pdf>; *Statute of the Special Court for Sierra Leone* in Report the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/915 (2000), arts. 14, 19(1), 20(3), online: SCSL < http://www.sc-sl.org/Documents/scsl-statute.html>; Statute of the Iraqi Special Tribunal, (10 December 2003), art. 17, online: Coalition Provisional Authority <http://www.cpa-iraq.org/human_rights/Statute.htm>.

developed by the modern *ad hoc* tribunals, but the most germane for the purposes of this discussion is Article 21, which for the first time in history elucidates sources of international criminal law in a treaty.[106] This provision states:

> 1. The Court shall apply:
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.[107]

Article 21 of the *Rome Statute* is worded in a very cumbersome manner. It can only be understood in the context in which it was drafted: by round after round of negotiation and compromise. It raises the most theoretical as well as the most practical challenges to the viability of the international criminal law tradition. The justification for the provision is both to provide a normative super structure to the tradition, as well as fill gaps in the law to be applied. However, as will be seen, it may fail to meet either of these objectives and risks undermining the entire project of the ICC.

A. Aims of the Applicable Law Provision

Why was a *de jure* provision on "applicable law" required in light of the *de facto* applicable law provisions applied by the modern *ad hoc* tribunals and historical tribunals? Without debating the content of such a provision, its mere existence is the first juncture for analysis. Article 21 of the *Rome Statute* has been called "a tissue of imperfectly defined sources,"[108] and its adoption has been justified on several grounds—which may be seen as recurring themes in the development of international criminal law.

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106. Margaret McAuliffe de Guzman, "Article 21: Applicable Law" in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) 435 at 438.

107. *Rome Statute*, *supra* note 2, art. 21. Art. 7(3) states: "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

First, given the hybrid nature and recent development of this tradition, an applicable law provision was thought necessary to resolve the challenges of "normative indeterminacy inherent in the development of international legal norms."[109] The promise of Article 21 in this regard is to provide a normative framework or structure for the entire legal world overseen by the ICC. Second, most commentators agree that Article 21 was designed to serve a gap-filling function to address lacunae where substantive, procedural or evidentiary rules are apparently lacking.[110] An important distinction is made with respect to gap-filling in national law versus in the international criminal law tradition. It has been recognized that national law is "anchored in a fine network of legal norms [i.e. a legal tradition] that lay down rules that are intricately interwoven with the codes."[111] The problem is that international criminal law has no longstanding tradition, only a tentative and uncertain existence with little theoretical basis. Without an established tradition behind it, international criminal law is a law seeking out a tradition—hence the paradox of it being an emerging legal tradition. Ironically, this predicament is both the root of the problem that Article 21 of the *Rome Statute* seeks to address, as well as the reason why Article 21 faces difficulties in patching together a legal tradition.

As the analysis of the modern *ad hoc* tribunals demonstrates, however, resort to transnational common laws has been used to fill the most difficult gaps in their statutes, including the appropriate balance to be struck between extending humanitarian protection and fairness to the accused. The extent to which Article 21 constrains or condones this approach warrants attention. Before delving into this analysis, however, it is necessary to situate Article 21 within the broader developments in the international criminal law tradition to understand its implications.

B. Separation from Public International Law Architecture

Article 21 of the *Rome Statute* represents a split, at least in part, from the dominance of public international law in international criminal law. Public international law was the foundation relied upon by the earlier international criminal tribunals. It has been fatally undermined in Article 21. This is not to deny the strong and ongoing role of public international law, but merely to identify that its exclusivity over international criminal law is abolished in the *Rome Statute*. However, some scholars deny such a break has taken place.

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108. Alain Pellet, "Applicable Law" in Antonio Cassese *et al.*, eds., *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2 (Oxford: Oxford University Press, 2002) 1051 at 1053.

109. McAuliffe de Guzman, *supra* note 106 at 439.

110. J. Verhoeven, "Article 21 of the Rome Statute and the Ambiguities of Applicable Law" (2002) 33 Netherlands Yearbook of International Law 3 at 17; McAuliffe de Guzman, *supra* note 106 at 443; Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001) at 52.

111. Pellet, *supra* note 108 at 1067.

To begin with, Margaret McAuliffe de Guzman has noted that while the applicable law provision in the *Rome Statute* is generally inspired by Article 38 of the *ICJ Statute*, Article 21 "modifies the approach taken in the ICJ Statute to fit the context of international *criminal* law."[112] By the time of the Rome Conference, it was clear that international criminal tribunals were applying Article 38 of the *ICJ Statute* as a matter of practice. Therefore, Article 21 of the *Rome Statute* must be viewed as a deliberate attempt to modify this approach. There are important differences between these provisions, which go to the heart of the international criminal law tradition. First, while Article 38 of the *ICJ Statute* places each of its sources of law on equal footing (with the exception of subsidiary sources such as judicial decisions and teachings of the most highly qualified publicists), Article 21 of the *Rome Statute* establishes a hierarchy or pyramid of sources. Secondly, there is no explicit mention of international custom in Article 21 of the *Rome Statute* as there is in Article 38 of the *ICJ Statute*—the former simply refers to "principles and rules of international law."[113] Third, Article 21(3) of the *Rome Statute* entrenches internationally recognized human rights as infusing the "application and interpretation" of every source of law, whereas no such provision appears in Article 38 of the *ICJ Statute*.[114] Fourth, Article 21(1)(c) of the *Rome Statute* represents a significant evolution of the concept of "general principles of law," which has been lauded as "bring[ing] useful precision to the definition of general principles of law."[115] Alan Nissel argues that "this was the most controversial source codified and distinguishes Article 21 of the Rome Statute from Article 38 of the statute establishing the International Court of Justice."[116] Finally, the nature of prior decisions of the ICC is defined differently in Article 21(2) of the *Rome Statute*, compared to Article 59 of the *ICJ Statute*.

Despite these significant differences between Article 21 of the *Rome Statute* and the general public international law sources, some prominent commentators continue to deny any break has been made with the traditional sources of public international law, as articulated in Article 38 of the *ICJ Statute*. These scholars still hold to the view, in the face of the plain wording of Article 21 and the record of the negotiations surrounding it, that public international law continues to reign within the institutions created by the *Rome Statute*. In other words, they deny that the ICC

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112. McAuliffe de Guzman, *supra* note 106 at 436.

113. *Rome Statute*, *supra* note 2, art. 21. See also Alan Nissel, "Continuing Crimes in the Rome Statute" (2004) 25 Mich. J. Int'l L. 653, at n. 142, who states: "While it is clear that custom is included in Article 21, it appears that the reason why 'custom' was not explicitly mentioned was because the concept of gradually evolving custom was considered too imprecise for the purposes of international criminal law."

114. *Rome Statute*, *ibid.*, art. 21(3).

115. Pellet, *supra* note 108 at 1082.

116. Nissel, *supra* note 113 at n. 19.

will be applying a law *sui generis*. M. Cherif Bassiouni argues that Article 10 of the *Rome Statute* "requires the application of international law whose four sources are listed in Article 38 of the Statue of the International Court of Justice."[117] Article 10 of the *Rome Statute* provides, "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law *for purposes other than this Statute*."[118]

Bassiouni's argument is quite weak and his denial that the international criminal law world changed after Article 21 is not convincing. It may be easily dispatched by focusing on the explicit wording in Article 10 of the *Rome Statute* which states " for purposes other than this Statute." Therefore, for the purposes *of* the Statute, Article 21 would be wholly and completely applicable. The ICC, as a creature of the *Rome Statute*, is governed by this treaty as its constitutional document. Despite the customary nature in international law of the sources articulated in Article 38 of the *ICJ Statute*, the ICC is bound first to consider the provisions of its own statute that have been crafted for the specific purposes to which the ICC is directed. It is entirely indefensible to argue that an international court should disregard a provision in its own statute in favor of an analogous, but different, provision in another international court's statute. Such an approach would run afoul of Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*,[119] which properly and squarely applies to the interpretation to be given to the *Rome Statute* itself. Interestingly, Bassiouni agrees that the ICC must apply these interpretive canons, making his argument contradictory.[120] Therefore, Article 21 of the *Rome Statute* represents a split from strict adherence to Article 38 of the *ICJ Statute* and in so doing, divorces international criminal law from the possibility of claiming public international law, with its thousands of years of history and traditions, as being the exclusive anchor for the law applied by the ICC in concrete cases.

C. Restraint in Judicial Law-Making

Another important aspect of the international criminal law tradition which has been seriously challenged in the *Rome Statute* is the role of international judges as lawmakers. One of the leading commentaries on the *Rome Statute* describes the fundamental debate on the role of judges at the ICC, and how Article 21 became a battleground on the issue:

> Two principle schools of thought emerged at the Preparatory Committee meetings regarding the appropriate degree of judicial discretion in discerning applicable law. A minority of States took the position that the principle of legality requires the virtual

117. Bassiouni, *supra* note 6 at 501.

118. *Rome Statute*, *supra* note 2, art. 10 [emphasis added].

119. *Supra* note 11.

120. Bassiouni, *supra* note 6 at 501.

> elimination of judicial discretion in the criminal law context. Any doubt as to the relevant legal provision should be resolved, according to this view, by direct application of the appropriate domestic law. The majority position, on the other hand, sought to accommodate the unique nature of the international legal order by allowing the judges to discern and apply general principles of international criminal law. Article 21 represents a compromise between these two schools of thought . . . .[121]

There is no agreement in the literature, however, on whether the *Rome Statute* as a whole has effectively altered the scope of authority of international judges to "make law." While some argue that "Article 21, therefore, accords a great deal of discretion to the judges of the ICC,"[122] others claim "they [the drafters] have shown a mistrust for the judge that is reflected in a large number of other provisions of the Statute."[123] While the judges of the post-World War II and modern *ad hoc* tribunals were entrusted with adopting and amending their Rules of Procedure and Evidence, this power is largely denied to the judges of the ICC. Pursuant to Article 51 of the *Rome Statute*, the ICC Rules of Procedure and Evidence "shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties."[124] Article 51(3) provides an exceptional procedure for provisional amendments of these rules by the judges: "[I]n urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties."[125] For its part, Rule 63(5) of the ICC Rules of Procedure and Evidence prohibits any direct application of national laws, reinforcing the authority of Article 21 in a redundant manner, stating "[t]he Chambers shall not apply national laws governing evidence, other than in accordance with article 21."[126]

Another limitation on the law-making abilities of the ICC judges is the existence of the Elements of Crimes which must also be adopted by two-thirds of the Assembly of States Parties. Article 9 of the *Rome Statute* provides that the Elements of Crimes "*shall assist* the Court in the interpretation and application of articles 6, 7 and 8 [genocide, crimes against humanity, and war crimes]."[127] The use of the mandatory term "shall" with the permissive term "assist" is a strange combination. Again, the reason for this lies in the nature of the *Rome Statute* as a negotiated treaty: "Some delega-

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121. McAuliffe de Guzman, *supra* note 106 at 436.
122. *Ibid.* at 439.
123. Pellet, *supra* note 108 at 1056.
124. *Rome Statute*, *supra* note 2, art. 51(1).
125. *Ibid.*, art. 51(3).
126. *Rules of Procedure and Evidence*, Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., New York, 3–10 September 2002, ICC-ASP/1/3—10, r. 63(5), online: ICC <http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/asp_records(e).pdf> [ICC Rules].
127. See *Rome Statute*, *supra* note 2, art. 9 [emphasis added].

tions, led by the US, wanted the Elements of Crimes to bind the ICC judges so as to ensure certainty and clarity of the law of the *Rome Statute*. Other delegations opposed restriction on the ICC judges in their interpretation of international criminal law."[128] The International Committee of the Red Cross (ICRC) commentary on the Elements of Crimes insists they "are to be used as an interpretative aid and are not binding upon the judges. The elements must 'be consistent with this Statute' and it should be emphasised that consistency with the Statute must be determined by the Court."[129]

Notwithstanding the apparent limitations on their law-making powers, it has been postulated "that the judges will interpret the text [of Article 21], at least partially, so as to recover the powers inherent in all courts, of which the drafters of the Statute clearly wanted to deprive them."[130] While this may be true of substantive law given the non-binding nature of the Elements of Crimes and their cursory nature, within the realm of procedural and evidentiary law the foregoing analysis demonstrates that there has been a genuine attempt to limit judicial discretion.

D. Deepening Divisions Between Humanitarian Protection & Fairness to Accused

Rather than attempting to reconcile the tension inherent in the international criminal law tradition between extending humanitarian protection versus ensuring fairness to the accused, the *Rome Statute* has only deepened these divisions.

Extending humanitarian protection inevitably occurred in the *Rome Statute*, given that numerous humanitarian organizations were involved in negotiations. The *Rome Statute* is not merely a codification of existing substantive law. For example, the ICTY Trial Chamber in *Kupreskic* found that Article 7(1)(h) of the *Rome Statute* on persecution as a crime against humanity "is not consonant with customary international law,"[131] and therefore refused to follow it. With respect to evidentiary and procedural law, there are several provisions in the ICC Rules of Procedure and Evidence that invoke Article 21(3) of the *Rome Statute* to extend humanitarian protection based on human rights norms. Allowances are made for the testimony of victims of sexual violence in Rule 72, based in part on the need to comply with internationally recognized human rights.[132] Likewise, Rule 145(2)(b)(v) identifies as an aggravating circumstance in sentencing the "[c]ommission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3 . . . ."[133]

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128. Kittichaisaree, *supra* note 110 at 51.

129. Knut Dörmann, Louise Doswald-Beck & Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003) at 8.

130. Pellet, *supra* note 108 at 1053.

131. *Kupreskic*, *supra* note 89 at para. 580.

132. See ICC Rules, *supra* note 126, r. 72(2).

133. *Ibid.*, r. 145(2)(b)(v).

Enhancing fairness to the accused is also embedded in the *Rome Statute*, flowing from the efforts of human rights and criminal law advocates during the negotiations. It has been argued that there are many examples of the "'victory' of the criminal law approach over the internationalist vision."[134] In particular, it has been asserted that "the word 'custom' was excluded [in Article 21], . . . due to the fact that the criminal lawyers, whose influence increased during the drafting of the Statute, opposed it in the name of an erroneous conception of the principle of the legality of offences and punishment."[135] The need for clarity in provisions holding individuals criminally responsible is repeatedly stressed in the commentary on Article 21.[136]

International human rights law, which operated as a powerful normative vehicle at the *ad hoc* tribunals, has become formally entrenched in the applicable law of the ICC. While no one would disagree that international human rights norms must inform international trials, Article 21 has taken the unprecedented step of raising all such norms to the level of quasi-constitutional status in a manner that can allow the judges of the ICC to effectively rewrite international criminal law with the stroke of a pen. Article 21(3) of the *Rome Statute* "mandates that the interpretation of the Statute should 'be consistent with internationally recognized human rights.' Though this phrase obviously refers to the rights of the accused, it can also be read to include the rights of the victims, which opens the door to a more aggressive mode of prosecution."[137] Under this view, with respect to the accused, the application and interpretation of the sources of law in Article 21(1) must be consistent with human rights, such that "procedural rules must be construed so as to not infringe the right to a fair trial."[138] More controversially, Article 21(3) may enable the ICC to declare existing rules of international law to be inapplicable due to inconsistency with human rights norms.[139] Notably, Article 21(3) does not simply refer to *jus cogens* norms, or even "*fundamental* human rights, traditionally quoted as examples of peremptory rules, but to all internationally recognized human rights."[140] As a result, the concept and scope of human rights norms that may be employed to interpret and develop law at the ICC is potentially vast.

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134. Pellet, *supra* note 108 at 1064.

135. *Ibid.* at 1071; Pellet's language is strong and borders on visceral as he earlier stated at 1057: "The result of a veritable brainwashing operation led by criminal lawyers, with the self-interested support of the United States, this argument is unacceptable."

136. See Verhoeven, *supra* note 110 at 10.

137. George P. Fletcher & Jens David Ohlin, "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case" (2005) 3 Journal of International Criminal Justice 539 at 552.

138. Verhoeven, *supra* note 110 at 14.

139. Pellet, *supra* note 108 at 1081; see also George E. Edwards, "International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy" (2001) 26 Yale J. Int'l L. 323; see *contra* Verhoeven, *supra* note 110 at 14–15.

140. Pellet, *ibid.* at 1081.

E. Ongoing Role of Transnational Common Laws

Recalling that one of the aims of Article 21 of the *Rome Statute* is to fill gaps in the law, and given that Glenn's theory of transnational common laws operate to fill gaps where there are no particular rules applicable,[141] does Article 21 open the door to transnational common laws? At least from a theoretical perspective, an affirmative answer may be reasonably given to this question. Notably, the final element of Glenn's theory is given a home in Article 21, since different law may apply to different individuals. In the context of criminal proceedings this presents a challenge to the rule of law.

Given that Article 21 is a hierarchical delineation of sources of law, the final source is where one must look to see if transnational common laws may operate. Article 21(1)(c) provides as a last resort that the ICC shall apply

> general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.[142]

Despite complaints of complexity in this wording, there is an emerging consensus in the literature that this provision confers "a wide discretionary power"[143] on judges, "will provide ample opportunities for judicial creativity,"[144] "allows the ICC to resort to drawing inspiration from case law in the criminal field decided by national courts of the various legal systems of the world,"[145] and leaves it to judicial discretion to determine which legal systems will be considered,[146] with the most likely candidates "reduced to a small number in the contemporary world: the family of civil-law countries, the common law, and, perhaps, Islamic law."[147] These views aggregate to make a powerful case that the basic characteristics of transnational common laws exist in Article 21(1)(c) of the *Rome Statute*, that they are non-binding but persuasive laws that may fill gaps where particular law is silent and depend on collaboration among judges.

This leaves the most controversial aspect of Glenn's theory of transnational common laws to be considered, namely, that it contemplates the possibility of different law applying to different people. As noted in Part II, this characteristic has not been clearly operating in this tradition in the past. However, Article 21(1)(c) of the

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141. See discussion in Part II, above, based on Glenn, *On Common Laws*, *supra* note 18 at 62, 45.
142. *Rome Statute*, *supra* note 2, art. 21(1)(c).
143. Pellet, *supra* note 108 at 1075.
144. Gennady M. Danilenko, "The Statute of the International Criminal Court and Third States" (2000) 21 Mich. J. Int'l L. 445 at 490.
145. Kittichaisaree, *supra* note 110 at 52.
146. McAuliffe de Guzman, *supra* note 106 at 444.
147. Pellet, *supra* note 108 at 1073–1074.

Rome Statute has authorized such a practice by approving, as a last resort, application of "the national laws of States that would normally exercise jurisdiction over the crime."[148] The drafting history of this provision sheds some light on what is meant by the "States that would normally exercise jurisdiction." An earlier proposal identified these as "first to the national law of the State where the crime was committed, second to the laws of the State of nationality of the accused, and third to the laws of the custodial State."[149] Given that this specific proposal was considered, but not adopted, it could also reasonably be held that based on passive personality jurisdiction under international law, the national laws of the victim's state could also be consulted in the case of an international armed conflict, systematic attack, or genocide. It is not possible to interpret Article 21(1)(c) of the *Rome Statute* as authorizing the application of the particular law of only one of these states, since it refers in the plural to the "national laws of States." Therefore, Article 21(1)(c) would operate to fill gaps first by considering legal systems (or traditions) of the world seeking broad consensus. If judges do not find such agreement, as in *Erdemovic*, then they would examine the smaller subset of national laws that would ordinarily apply on the facts of the particular case. While there could be multiple national laws applicable, in cases of non-international armed conflicts it is conceivable that only one state would normally have jurisdiction.

For example, in the Uganda situation that is presently before the ICC, where a perpetrator is a member of the Lord's Resistance Army and a Ugandan national, the conflict is in northern Uganda, the victim is Ugandan, and if the accused is apprehended and held in custody in Uganda before transfer to the ICC, then only Uganda would normally exercise jurisdiction, and Ugandan law would only be applied at the ICC as a last resort. In the end, however, Ugandan law could be rendered inapplicable if it is "inconsistent with this Statute and with international law and internationally recognized norms and standards."[150] This would be the ultimate situation of *non-liquet*. There would, theoretically, be no answer. If, however, the Ugandan law met this requirement, it would be applied by the ICC. In a case dealing with another non-international armed conflict, the law of that State could be applicable. We are thus faced with the possibility of different law applying to different accused persons.

For scholars who have seriously considered this provision's implications, there has been an allergic reaction to this possibility, but they have fallen short of recognizing that Article 21 has the potential to undermine the rule of law. Margaret McAuliffe de Guzman, for example, notes that this "particularized

148. *Rome Statute*, *supra* note 2, art. 21(1)(c).
149. McAuliffe de Guzman, *supra* note 106 at 444.
150. *Rome Statute*, *supra* note 2, art. 21(1)(c).

approach would undermine the consistent application of the law to different accused."[151] This brings us to the final major implication of Article 21 for the international criminal law tradition.

F. Nature of Prior Decisions of the ICC Indeterminate

A decision will need to be made by the ICC about whether it will tolerate different law applying to different accused, or if after it makes the very first "particularized" decision based on the subset of national laws of states that would normally exercise jurisdiction, it will opt instead to follow that decision in future cases as enabled under Article 21(2). The wording of this provision on the nature of prior decisions of the ICC is otherwise quite uninteresting, at least at first blush:[152] "The Court *may* apply principles and rules of law as interpreted in its previous decisions."[153] It has been recognized that this is a "discretionary use of precedent . . . [that] . . . represents a compromise between the common law approach to judicial decisions as binding precedent, and the traditional civil law view that judicial pronouncements in specific cases bind only the parties before the court."[154] Some commentators have predicted that the ICC will simply adopt the same approach as the modern *ad hoc* tribunals, discussed in Part II, regarding the treatment of their past decisions.[155]

It is possible that Article 21(2) of the *Rome Statute* carries more significant implications for the international criminal law tradition than has been envisaged to date. The first possibility, which is the approach of the modern *ad hoc* tribunals, is to build a body of jurisprudence over time that initially draws heavily on sources external to the tribunals, but increasingly relies on the tribunal's own jurisprudence over time, looking outside their walls only to fill lacunae. This is also inherent in the tailored doctrine of precedent developed by the modern *ad hoc* tribunals, discussed in Part II. This standard appears to be more stringent than that appearing in Article 21(2) of the *Rome Statute*, which is completely permissive in apparently allowing the judges to disregard or apply their prior decisions at will. It would be open to the

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151. McAuliffe de Guzman, *supra* note 106 at 444.

152. Verhoeven, *supra* note 110 at 13, notes: "Obviously, it would be sheer nonsense to affirm that the Court is forbidden to apply principles and rules as interpreted in its previous decisions."

153. *Rome Statute*, *supra* note 2, art. 21(2) [emphasis added]. With respect to treatment of the decisions of the modern *ad hoc* tribunals, they " are not binding on the recently established International Criminal Court (ICC), but interpretations of their governing rules and statutes will be persuasive authority due to their similarities with those of the ICC." Kelly Buchanan, "Freedom of Expression and International Criminal Law: An Analysis of the Decision to Create a Testimonial Privilege for Journalists" (2004) 35 V.U.W.L.R.609 at 651. See also Lucy Martinez, "Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems" (2002) 34 Rutgers L.J.1 at 17; and Phyllis Hwang, "Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court" (1998) 22 Fordham Int'l L.J. 457 at 503.

154. McAuliffe de Guzman, *supra* note 106 at 445.

155. Kittichaisaree, *supra* note 110 at 52.

judges at the ICC to follow the lead of the modern *ad hoc* tribunals. Indeed, many expect that "the ICC will facilitate the uniform and consistent application of international criminal law. By rendering judgments in concrete cases and developing a consistent jurisprudence, the ICC may clarify and even develop international criminal law."[156] In this way, Article 21(2) of the *Rome Statute* would increasingly operate, as the ICC begins to decide issues in concrete cases, to resolve legal issues *without* resort to the other sources of law in Article 21(1)(b),(c). This would suggest a phased development of the ICC's jurisprudence, and a gradual closing of the porous borders of international criminal law to other legal traditions.

The second possibility would be for the ICC to rely on Article 21(2) of the *Rome Statute*, likely in conjunction with Article 21(3), to proactively develop international criminal law with only a loose concept of precedent. Any prior decision with which the judges simply did not agree based on prevailing human rights principles could be disregarded. A dynamic normative order would be created, constantly adapting to new situations and conflicts. This possibility appears to be authorized based on the wording of Article 21.

In either of these models, the ICC has the potential, through the operation of Article 21(2), to bring into existence "a new legal order of international law,"[157] invoking the language used by the European Court of Justice to describe its *sui generis* character.

IV. CONCLUSION

International criminal law's emergence in the wake of the darkest periods of human history has placed pressures on it that few other areas of law have had to endure. It was forced into the courtroom in advance of a clear articulation of what law the judges hearing international criminal trials were to apply. The legitimacy of such an exercise after World War II faced serious challenges that have only resurfaced as Article 21 of the *Rome Statute* has attempted anew to refashion the normative structure underlying international criminal law. These challenges include the need to transcend often divergent national laws within untested and *ad hoc* institutions. In many ways international criminal law exists at the intersection of well-established legal traditions, each seeking to exert their influence on its development. This article has demonstrated that these established traditions do not simply apply as sources of customary international law, but as transnational common laws that are persuasive, non-binding, and derived by judges of international criminal tribunals in a highly discretionary manner in difficult cases. The benefit of *ad hoc* institutions is that we can learn from them and adapt, such that

156. Danilenko, *supra* note 144 at 490.

157. Pellet, *supra* note 108 at 1053.

new generations of institutions may be crafted and improved upon. A major drawback of the creation of a permanent international criminal court is that prospects for reform are likely to be less expedient as institution inertia sets in over the years.

At the root of the discretionary selection by judges among the possible sources of norms is a competition between fundamental principles of the international criminal law tradition. On one hand, there is the need to enhance humanitarian protection to victims, an ideal embedded in international humanitarian law and particularly the Martens Clause. On the other hand, there is the aim of maximizing fairness to the accused, an ideal enshrined in the growing body of international human rights law and codified in Article 21(3) of the *Rome Statute* of the ICC. This contest of values has been the pivotal turning point in resolving legal issues before the modern *ad hoc* tribunals in several difficult cases where traditional sources of law have failed to provide an answer. In some of these decisions, this dilemma has been laid bare in the reasoning of the judges, whereas in others it has been kept hidden in their stated reasons.

It is a finding of some significance that international criminal tribunals historically could not simply rely upon the general sources of public international law in resolving difficult cases. Even public international law failed to provide a sufficient anchor for international criminal law. It is perhaps even more significant looking forward that Article 21 of the *Rome Statute* of the ICC ends the monopoly of these general sources of public international law that were supposedly the foundation of the jurisprudence of the modern *ad hoc* tribunals, replacing it with a new normative regime that is variable and indeterminate.

As has been shown on a theoretical basis, Article 21 of the *Rome Statute* has not resolved fundamental tensions and challenges inherent in the international criminal law tradition. Rather, it has potentially exacerbated these ideological conflicts. Despite seeking to serve a gap-filling function, Article 21 may fail to do so satisfactorily. While recrafting the relationship between international criminal law and other national legal traditions, Article 21 broadens the ability of judges to resort to transnational common laws. The ongoing development of international criminal law is an open question due to Article 21(2) of the *Rome Statute*, which leaves it to the judges of the ICC to determine whether to adopt a system of non-binding precedent, or to opt for a dynamic jurisprudence which evolves in accordance with Article 21(3) of the *Rome Statute* to reflect changes in internationally recognized human rights. Until the ICC definitively and consistently articulates its position on the precedential value of its decisions, the strength of the rule of law will be in doubt in its jurisprudence.

A great deal of hope has been placed in international criminal law that it can effectively enforce international humanitarian law obligations. There are high but sometimes shaken expectations in its ability to administer international justice in a fair and efficient manner, while at the same time being receptive to national laws as well as emerging international human rights standards. These aspirations will be better served if more attention is paid to the foundational aspects of this emerging legal tradition which has been given a degree of permanency in the ICC.